Filed 9/30/03 R.P. Diamonds v. Underwriters at Lloyd's London CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

R. P. DIAMONDS & GOLD IMPORTS, INC., Plaintiff and Appellant, v. UNDERWRITERS AT LLOYD'S LONDON et al., Defendants and Respondents.	A100997 (San Francisco County Super. Ct. No. 317168)

Plaintiff R. P. Diamonds & Gold Imports, Inc. brought this action for damages after respondents Underwriters at Lloyd's London et al. (Underwriters)[1] refused to pay a claim for losses sustained when plaintiff's employee was robbed in the course of transporting jewelry insured under a "jeweler's block policy." The trial court granted summary judgment for defendants on the ground that the loss fell within a "personal conveyance clause" which withheld coverage for property "in transit" unless it was in the "hand or sight" of the insured or its employees. Plaintiff contends that this provision was

[1] Respondents initially answered the complaint as "Certain Underwriters at Lloyds London, JLJ, WTK (Erroneously Sued as Underwriters at Lloyds London: BDK, PDA, DPM, KLN, RJH, HGJ, BAR, JLJ, WTK, PBC, TMH, GLR, BFC)." On their brief, however, they identify themselves as "Those Interested Underwriters Subscribing to Policy Numbers GD78321 and GD76510 erroneously sued as Underwriters at Lloyd's London, etc." No issue has been raised concerning their identities or capacity to be sued. We join the parties in referring to them as "Underwriters."

ambiguous as applied to the circumstances of the loss, and should be construed to afford coverage. We agree that the clause is ambiguous as applicable here, and that the ambiguity must be construed to afford coverage. Accordingly, we reverse the judgment.

BACKGROUND

The material facts for purposes of the motion for summary judgment appear to be undisputed. Underwriters sold plaintiff a jeweler's block policy which covered "all risks of loss of or damage to" certain jewelry, subject to exceptions and exclusions. Among the latter was the personal conveyance clause, which declared that the policy "only covers the Property Insured in transit *when in the hand or sight* of the Assured and/or responsible staff . . . ." (Italics added.)

On December 5, 1999, two of plaintiff's employees were driving a van in Arizona on a sales trip. In their custody were two suitcases containing insured jewelry. They stopped at a roadside fast-food restaurant, which one of them entered in order to get some drinks and use the restroom. The other employee, Son Quy Hoang, later testified in deposition that he got out of the van to stretch and get some fresh air, leaving the suitcases containing the insured jewelry inside the van near a sliding door on the right side. He stood at the rear of the van, leaning his back against the rear door, with one foot on the ground and the other on the bumper, facing away from the van toward the road. Because the van had tinted windows, he testified, he could not see the jewelry from this position even if he turned to look into the van.

After standing in this manner for perhaps a minute, Hoang saw several men approach. One grabbed his shirt, pulled a gun, and pushed him to the ground beside the van, where he lay face down. The men broke a window out of the van and took everything inside, including the suitcases containing the jewelry.

Plaintiff submitted a claim, which Underwriters denied. Plaintiff brought this action asserting a "tortious breach of insurance contract" against Underwriters. A second cause of action charged plaintiff's insurance broker with negligent misrepresentation. It is undisputed that Underwriters are parties only to the first cause of action.

Underwriters moved for summary judgment on the ground that coverage was excluded by both the personal conveyance clause and the "unattended automobile exclusion," which allowed coverage for jewelry in a vehicle only if the insured or an agent was "in or upon" the vehicle.[2] Underwriters relied on the sworn statements and deposition testimony of Hoang concerning the circumstances of the robbery.[3] Plaintiff offered its own evidence, including expert deposition testimony, going only to the question whether Hoang had been "in violation" of the unattended automobile exclusion.

The court tentatively ruled against Underwriters, stating that for purposes of the motion Hoang must be deemed to have been leaning on the van, thereby rendering inapplicable the unattended automobile exclusion. The court also opined that the jewelry had to be considered within Hoang's sight because it was "within his sight line." Counsel for Underwriters contested only the latter point, contending that the personal conveyance clause excluded coverage. The court took the matter under submission while inviting supplemental letter briefs, which the parties duly filed. The court granted the motion on the basis that "the 'Personal Conveyance Clause' bars plaintiff's action as a matter of law," and entered judgment accordingly. Plaintiff filed a premature notice of appeal but, at our invitation, filed an amended notice properly referring to the judgment.

DISCUSSION

" '[I]nterpretation of an insurance policy is a question of law.' [Citation.] 'While insurance contracts have special features, they are still contracts to which the ordinary

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[2] Underwriters contended that Hoang's earlier statements established that he was not touching the van when the robbery commenced. This contention is immaterial here because it goes only to the unattended automobile exclusion, on which no reliance is placed in this court.

[3] Plaintiff raised some evidentiary objections to portions of Hoang's statements, but the objections were apparently cured by supplemental declarations. Plaintiff did not press the objections at the hearing on the motion, and although plaintiff alludes to them on appeal, plaintiff does not distinctly argue that the motion should have been denied on this ground. (See Cal. Rules of Court, rule 14(a)(1)(B).)

rules of contractual interpretation apply.' [Citation.] Thus, 'the mutual intention of the parties at the time the contract is formed governs interpretation.' [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.]" (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115 (*Palmer*); *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1074-1075.) "When interpreting a policy provision, we must give its terms their ' "ordinary and popular sense," unless [they are] "used by the parties in a technical sense or a special meaning is given to them by usage." ' [Citations.] We must also interpret these terms 'in context' [citation], and give effect 'to every part' of the policy with 'each clause helping to interpret the other.' [Citations.]" (*Palmer*, *supra*, 21 Cal.4th at p. 1115.) "If the policy language 'is clear and explicit, it governs.' [Citation.]" (*Ibid*.)

As with other contracts, issues of interpretation arise under an insurance policy when the terms pertaining to a claim are *ambiguous*. "A policy provision is ambiguous . . . if it is susceptible to two or more reasonable constructions despite the plain meaning of its terms within the context of the policy as a whole. [Citation.]" (*Palmer, supra,* 21 Cal.4th at p. 1115.) If the court finds this to be the case, it will first seek to resolve the ambiguity by interpreting the promise " 'in the sense which the promisor believed, at the time of making it, that the promisee understood it.' " (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265.) If this rule does not yield a clear result, the promise will be construed against the insurer. (*Id.* at p. 1265; see *Palmer*, *supra*, 21 Cal.4th at p. 1115 [in case of ambiguity, court may invoke principle that ambiguities are construed against party who caused them to exist].)

The questions thus presented are (1) can the personal conveyance clause be reasonably understood to provide coverage under the circumstances shown by the undisputed evidence, and if so (2) is this the understanding Underwriters should have expected plaintiff to have when the parties entered the contract? That clause limited Underwriters' liability for the loss of property "in transit" by providing that such property was covered "only" when "in the hand or sight of the Assured and/or responsible staff . . . ." It is undisputed that the property here was "in transit." Therefore the pivotal

question is what was intended by the requirement that it be "in the hand or sight" of Mr. Hoang.

The narrowest meaning of "in hand" is "[h]eld or carried." (6 Oxford English Dict. (2d ed. 1989) p. 1064.) Similarly the narrow meaning of "in sight" is "before one's eyes" (15 Oxford English Dict., *supra*, at p. 444), or more simply, "visible" (Concise Oxford Dict. (6th ed. 1976) p. 1001). However, both phrases are commonly used in broader senses. Thus "in hand" may mean "in one's possession or control" (Merriam-Webster's Collegiate Dict. (10th ed. 1998) p. 525) or "[p]resently accessible" (American Heritage Dict. of the English Language (4th ed. 2000), p. 794). Similarly, "in sight" may mean "at or within a reasonable distance or time" (Merriam-Webster's Collegiate Dict., *supra*, at p. 1087), or "clearly near at hand" (Concise Oxford Dict., *supra*, at p. 1061; see 15 Oxford English Dict., *supra*, at p. 445, italics in original ["sight" as "[t]he range or field of one's vision; chiefly in [the] phr[ase] *out of one's sight*"]).

While these broader meanings originally evolved from figurative usages, they are not now restricted to abstract or figurative contexts. Thus the seller of an object need not be holding or carrying it in order to state truthfully that he has it "in hand"; rather it is "in hand" if he has it so securely at his disposal that he can deliver it instantaneously upon demand. Similarly an object may properly be characterized as "in sight" although the beholder is not gazing directly upon it, and even when it is not immediately exposed to his gaze. Rather it may be correctly described as "in sight" so long as he maintains a position from which it may be immediately brought under his or her direct gaze with slight effort.

Given this varying range of meanings we think the personal conveyance clause can be reasonably construed to mean that the property here was "in the hand or sight" of the insured's employee Hoang at the time of the loss. True, it was not literally in his hands or on his person, and was not visible from his immediate vantage point. However the jewelry was "in hand" in the sense that it was under his close supervision and control and at his immediate disposal. No one could reach the jewelry without Hoang's first becoming aware of their attempt to do so, and he could take the property literally into his

hands in a matter of seconds by walking a few feet, opening the van, and removing the jewelry from its cases. Similarly the property was "in sight" in the senses that it was within a reasonable distance, was clearly near at hand, and was within the range or field of his vision, i.e., he could bring it before his eyes by turning his head to look into the van, or at most by walking a few steps and opening the door.

Given that the policy language is susceptible to two (or more) reasonable interpretations, we must seek to ascertain the meaning in which the insurer, as drafter, would have expected the insured to understand it. (*Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at pp. 1264-1265.) Certainly no one would expect the insured to intend the personal conveyance clause to be applied in its narrowest and most literal sense. That would mean that the insured could satisfy the "in hand" proviso only by holding the property in one or both hands, or perhaps—though this employs a slightly less literal sense of "in hand"—carrying it upon his person. The former would flatly preclude the insured from driving anywhere with the property, and the latter would appear impracticable where, as was apparently true here, there was too much insured property to be carried on the person. Nor could the property be kept "in sight" in its narrowest sense while the insured was driving, for even if it were displayed on the dashboard the insured would doubtless be forced to admit that he could not keep his eyes on it while operating the vehicle. Counsel for defendant stated below that the usual practice, which would presumably preserve coverage, was "when you get in a car, put the jewelry or the bag containing the jewelry on your lap or by your feet." But in the second instance, at least, the jewelry would be neither "in hand" nor "in sight" in the narrowest sense.

Courts will not attribute to policy language a construction which "leads to absurd results and ignores the familiar connotations of the words used." (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 652.) The "familiar connotations" of the phrases "in hand" and "in sight" would extend here to the position of the insured's employee Hoang relative to the insured property, i.e., within easy reach and view, in no danger of accidental loss or misplacement, and perfectly well situated to detect and thwart any surreptitious attempt at theft. Since this is the sense in which we believe Underwriters

should have expected the insured to understand the language at issue, there is no occasion to resort to the further step of construing the language against the insurer—although, of course, the result would be the same.

The judgment is reversed.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.